ARUMUGAM PONUSAMY

v.

KARUPIAH RAMASAMY & ORS;
SAWEENA GROUP SDN BHD (INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN ZAKARIA J
[ORIGINATING SUMMONS NO: S3-24-2393-99]
12 NOVEMBER 2001

CIVIL PROCEDURE: *Execution - Stay - Application for - Test to be applied - Special circumstances test or nugatory test - Conflicting decisions of Court of Appeal - Principles for granting stay - Balance of convenience - Arguable case on appeal - Whether appeal, if successful, would be rendered nugatory*

This was an application by the plaintiff under O. 45 r. 11 of the Rules of the High Court 1980 to stay an earlier decision of the court dismissing the plaintiff's application/action and allowing the intervener's application.

Held:

[1] The 'special circumstances' test enunciated in the later decision of the Court of Appeal in *Tropiland Sdn Bhd v. DCB Bank Bhd & Ors* is to be preferred to the 'nugatory' test proposed in the earlier Court of Appeal decision in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors.* The essential constituents of 'special circumstances' are: (i) balance of convenience; (ii) an arguable case on appeal; and (iii) whether the appeal, if successful, would be rendered nugatory. *(Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee))*. (pp 130 a-h & 131 a-d)

[2] The plaintiff's appeal, if successful, would be rendered nugatory as the intervener (which purchased the land from the defendants) was already in the process of selling the land to a third party. The plaintiff would suffer irreparable damage that could not be compensated by an award of damages. Hence, the balance of convenience was in favour of preserving the *status quo* until the final disposal of the plaintiff's appeal. The plaintiff also had an arguable case on appeal as there was *prima facie* evidence that the defendants did not give due consideration to the interests of the beneficiaries when they sold the land to the intervener. (pp 131 e-f & 132 c)

[Application for stay allowed.]

Case(s) referred to:

Chong Wooi Leong v. Lebbey Sdn Bhd [1998] 2 CLJ 509 ***(refd)***

Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee) [2000] 3 CLJ 361 ***(refd)***

Leong Poh Shun v. Ng Kat Chong [1966] 1 MLJ 86 ***(foll)***

Matang Holdings Sdn Bhd & Ors v. Dato' Lee San Choon & Ors [1985] 2 MLJ 406 ***(foll)***

Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Bing Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(foll)***

See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(not foll)***

Serangoon Garden Estates Ltd v. Ang Keng [1953] MLJ 116 ***(foll)***

Tan Soo Bing & Ors v. Tan Kooi Fook [1997] 1 CLJ 556 ***(refd)***

Tropiland Sdn Bhd v. DCB Bank Bhd & Ors [2000] 1 CLJ 568 ***(foll)***

Legislation referred to:

National Land Code, s. 417

Rules of the High Court 1980, O. 45 r. 11

For the plaintiff - Malik Imtiaz Sarwar (Karina Yong Ker-Ai); M/s Malik Imtiaz Sarwar

For the 1st, 2nd & 3rd defendants - V Selva; M/s Selva Veerah

For the 5th defendant - M Pala; M/s Pala Muthu & Assoc

For the intervener - Conrad Young; M/s Sivananthan

Reported by Gan Peng Chiang

JUDGMENT

Arifin Zakaria J:

This is an application (encl. 50) by the plaintiff under O. 45 r. 11 of the Rules of the High Court 1980 ("the Rules") to stay the order of this court given by YA Dato' Hashim bin Dato' Hj. Yusoff on 12 January 2001 dismissing the plaintiff's application at encl. (1) and further allowing the intervener's application. From my perusal of the file it came to light that there was no formal application for any order ever made by the intervener, apparently the application is found in the intervener's written submission dated 21 August 2000 filed herein.

As background it may be necessary to briefly narrate the events leading to this action. The subject matter in dispute is a piece of land held under HS(D) 86890 PT. No. 77, Mukim dan Daerah Damansara ("the land") owned by 100 persons, members of the Malaysian Dravidian Association ("the shareholders"). Prior to this, legal action had already been taken by the 5th defendant herein, as representative of the majority of the shareholders *vide* KL High Court suit No. F623-84 ("the first action"). The said action was finally settled and a Deed of Compromise dated 4 June 1998 was recorded therein. (See encl. 2 exh. "AP2").

The plaintiff herein is said to be the representative of the majority of the shareholders and the 1st to 4th defendants are the trustees in the Deed of Compromise in whose names the land is now registered. The 4th defendant is now deceased. The 5th defendant is named as a party as he was one of the plaintiffs in the first action and currently is said to represent the balance of the shareholders not represented by the plaintiff in the present case. He supports the plaintiff's case herein.

Next comes the intervener who claims to be the purchaser of the land under the sale and purchase agreement entered into by the 1st to 4th defendants dated 4 December 1999 for the sum of RM16.2 million.

In this action as per amended originating summons (encl. 22) the plaintiff prays for, *inter alia*, the following orders:

1. Bahawa Defendan Pertama hingga Keempat ditanggalkan sebagai Pemegang-Pemegang Amanah bagi HS(D)86890, P.T. No. 77, Bukit Damansara, Daerah Petaling, Negeri Selangor ("Tanah tersebut") dan/atau digantikan dengan Pemegang-Pemegang Amanah yang Mahkamah yang Mulia ini anggap sesuai;

a1) deklarasi bahawa Pemegang-Pemegang Amanah bagi tanah tersebut, Defendan Pertama hingga Keempat mempunyai tanggungjawab ("overriding duty") untuk memastikan bahawa terma-terma Deed of Compromise bertarikh 4.6.1998 ("Deed of Compromise tersebut") dilaksanakan, yang mana tanggungjawab memerlukan Pemegang-Pemegang Amanah pada segala masa untuk:

(i) memastikan bahawa segala hak-hak benefisiari tanah tersebut dipelihara; dan

(ii) termasuk di dalam tanggungjawab (i), untuk memperolehi harga pembelian terbaik bagi tanah tersebut untuk benefisiari-benefisiari tanah tersebut.

a2) deklarasi bahawa dalam memasukki Perjanjian jual beli yang ditandatangani di antara Pencelah dan Defendan-Defendan Pertama, Kedua, Ketiga dan Keempat pada 4.12.1999 untuk pembelian tanah tersebut oleh pihak pencelah ("Perjanjian itu") Defendan-Defendan Pertama hingga Keempat telah gagal melaksanakan tanggungjawab tersebut dan bercanggah dengan kewajipan mereka di sisi undang-undang.

a3) bahawa Perjanjian itu dibatalkan dan/atau diketepikan.

a4) bahawa Pencelah membayar gantirugi kepada Plaintif di mana gantirugi ditaksirkan oleh Mahkamah yang Mulia ini.

b) bahawa Defendan-Defendan Pertama hingga Keempat memberi kepada peguamcara di dalam masa tujuh (7) hari dari tarikh perintah di dalam ini segala dokumen-dokumen berkaitan dengan tanah tersebut termasuk tetapi tidak terhad kepada surat hakmilik, resit-resit dan selainnya.

(c) bahawa defendan-defendan pertama hingga keempat akan mengambil segala langkah perlu untuk memenuhi niat di belakang perenggan 1 di dalam ini termasuk menandatangani ataupun melaksanakan segala dokumen-dokumen yang perlu.

c(1) bahawa D1 hingga D4 "indemnity" segala kerugian yang dialami oleh benefisiari-benefisiari sebagaimana yang ditaksir oleh Mahkamah yang mulia ini.

The guiding principles relating to stay of execution are found in a line of cases beginning with the local case of *Serangoon Garden Estates Ltd. v. Ang Keng* [1953] MLJ 116. There Brown J stated thus:

> This is an appeal from an order granting a stay of execution in a possession case. The order for possession had been made upon the ground that the defendant had used or permitted the premises to be used for an illegal purpose, *viz.* the keeping of pigs without a licence from the Rural Board.
>
> The application for a stay of execution was not made at the conclusion of the case, and when the application was subsequently made no affidavit in support was filed. The learned district judge explains this upon the ground that the plaintiff's counsel, while drawing attention to the absence of an affidavit, took no objection upon that ground, and as the facts were within the knowledge of the court the application was heard as if it had been made at the conclusion of the case. In this court counsel for the appellant does not agree that he took no objection before the learned district judge.
>
> The learned District Judge had a discretion to grant a stay of execution. And I should not think it right to interfere with the exercise of his discretion, if I was satisfied that he had exercised it on correct principles. There is no rule of practice limiting the exercise of his discretion. But it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it. The only ground, so far as appears in the written grounds for granting this stay, is that if the defendant succeeded in his appeal he could not be restored to the same position as before because the plaintiffs would have removed his pigsty. That ground, standing alone, in my opinion cannot be a sufficient ground on which to grant a stay of execution. It seems to me that to hold otherwise would be to establish a precedent, and in effect to lay down a rule of practice, that in all cases where the defendant cannot be restored to his original position if his appeal succeeds, a successful litigant is to be deprived of the fruits of his litigation until such time as the appeal is

determined. Such a ground might well be an important factor to take into consideration if there were other grounds. If, for example, another ground had been that there were merits in the appeal, that fact coupled with the fact that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances to justify the learned District Judge in exercising his discretion to grant a stay; and I should not have thought it right to interfere.

In the absence of an affidavit I have considered whether any special circumstances which could justify the order for a stay of execution can be found in the Record of trial or in the learned District Judge's Grounds of Decision in the action. I can find none. I am therefore left in this position:

(1) there is no affidavit setting out the special circumstances which are alleged;

(2) the Record discloses no special circumstances; and

(3) the only ground given by the learned District Judge for granting this stay does not amount to special circumstances which would justify it.

The appeal must therefore be allowed. No order as to costs.

In *Leong Poh Shun v. Ng Kat Chong* [1966] 1 MLJ 86 HRH Raja Azlan Shah (as HRH then was) reaffirmed the above principle. At p. 86 he said:

Although the court has an unqualified discretion to grant a stay it has never been the practice to do so unless it is supported by an affidavit of special circumstances. The law on the point is well settled. I quote a passage from *Halsbury's Laws of England*, 3 Edn. Vol. 16, paragraph 51 at page 35:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

I would also adopt a passage in *Mallal's Supreme Court Practice* at page 573 where the learned author said:

> A stay will not be allowed unless there are special circumstances.

Then came the case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Bing Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2)* [1976] 1 MLJ 131. In that case the Federal Court held that as no special circumstances were shown to support the application for stay of execution in the case the application for stay must be refused.

In *Matang Holdings Sdn. Bhd. & Ors. v. Dato' Lee San Choon & Ors.* [1985] 2 MLJ 406 it was stated that an appeal to the higher courts is not such ground as to constitute special circumstances unless there are merits in the appeal. Special circumstances must constitute something distinctive and out of the way. The court will not deprive a successful party of the fruits of his litigation until an appeal is determined unless the unsuccessful party can show special circumstances to justify it.

The Court of Appeal in *See Teow Guan & Ors. v. Kian Joo Holdings Sdn. Bhd. & Ors*. [1997] 2 CLJ 299 had noticeably departed from the conventional approach. Gopal Sri Ram JCA in that case at p. 307 stated thus:

> At one time it was thought that an appellant had to demonstrate that there were special circumstances warranting a stay of proceedings or of execution. This was founded on the notion that a successful litigant ought not to be deprived of the fruits of his litigation. See the case of *The Annot Lyle* [1886] 11 PD 114. The authority constantly relied upon in support of the proposition that special circumstances ought to be demonstrated before a stay of execution may be granted is the judgment of Brown J in *Serangoon Garden Estates Ltd. v. Ang Keng* [1953] MLJ 116. For my part, having considered the more recent authorities on the subject, I have come to the conclusion that that decision is bad law, and ought no longer to be followed by this court.

At p. 308 he said further:

> For my part, I am unable to see any good reason for our courts to cling on to a legal test which has been repudiated, for good reasons, by the courts of the jurisdiction from which that test emanated. In any event, I find that there is respectable authority in our own jurisdiction that points to a more practical and less stringent approach to the problem.

The CA (different panel) in *Tropiland Sdn. Bhd. v. DCB Bank Bhd. & Ors.* [2000] 1 CLJ 568, however, seems to have reverted back to the earlier test ie, the special circumstances test. There, in dismissing the application for stay of the High Court's writ of possession pending disposal of the applicant's appeal, at p. 571 it is stated thus:

> We also found the plaintiff has not shown any special circumstances for a stay to be ordered. We were fortified in our decision by the Federal Court case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Bing Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2)* [1976] 1 MLJ 131 which refused the application for stay as no special circumstances were shown to support the application for stay.

Having considered the two apparently conflicting views of the CA with respect, I am more inclined to follow the later decision of CA since it is clearly in line with the majority of authorities prevailing within our jurisdiction. In this regard I am supported by my learned brother Vincent Ng J in *Jaya Harta Realty Sdn Bhd v. Koperasi Kemajuan Pekerja-pekerja Ladang Bhd; Tetuan Isharidah, Ho, Chong & Menon (Garnishee)* [2000] 3 CLJ 361; [2000] CLJ JT(5). In that case after considering a long line of authorities at p. 366 he stated:

> On the topic under discussion it may perhaps be of assistance to take excerpts from para. 455 (at p. 272) of *Halsbury's Laws of England* vol 17 (4th edn) which reads: "The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing. And, on the distinction between stay of execution of a final judgment or order and stay of proceedings, it may be pertinent to set out para. 451 (at p. 269) of the same volume in *Halsbury's*, which states: 'The court's power to stay proceedings should not be confused with its power to stay the execution of a final judgment or order. The court has an inherent jurisdiction to control its own proceedings so as to prevent an abuse of process, and accordingly to stay proceedings which are frivolous, vexatious or harassing, or which are manifestly groundless or in which there is clearly no cause of action in law or equity, or where the justice of the case so requires. The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself. A further distinction to note is that in stay of proceedings cases the court's inherent jurisdiction is invoked, whereas applications for stay of execution of judgment are, in our High Courts, governed by a specific provision, being O. 45 r. 11 of the Rules. Order 45 r. 11 provides that: "Without prejudice to O. 27 r. 1, a party against whom a judgment has been given or an order made may apply to the court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks fit."

And at p. 369 he sets out the three essential ingredients constituting special circumstances in the following terms:

In *Alexander v. Cambridge Credit Corp Ltd*, although Kirby P, when delivering the judgment of the Court of Appeal of New South Wales, had frowned upon the use of the expression 'special or exceptional circumstances' in preference to 'an appropriate case', he nevertheless quite correctly (in my view) set out the following three essential ingredients (the traditional core ingredients) that are necessary to demonstrate 'an appropriate case' to warrant the exercise of discretion in favour of a stay, namely:

(i) where 'the balance of convenience' is in favour of the applicant/appellant (see also *AG v. Emerson & Ors; Clyne v. Deputy Commissioner of Taxation*); and such balance of convenience may sometimes be maintained by the stay being made subject to certain conditions imposed by the court (as per provision '... may order ... on such terms as it thinks fit', in O. 45 r. 11 of the Rules, and also see *Andrews & Anor v. John Fairfax & Sons Ltd*);

(ii) where 'it is apparent that unless a stay is granted an appeal will be rendered nugatory ...' (see also *Wilson v. Church No. 2* and *Scarborough v. Lew's Junction Stores Pty Ltd*.); and

(iii) that the applicant/appellant 'has an arguable' appeal.

Applying the principles enunciated above to the facts and circumstances in the instant case I am of the view that there is force in the plaintiff's contention that if stay is not granted then the appeal, in the event he is successful, would be rendered nugatory. It is alleged by the plaintiff in his affidavit (encl. 49) that the intervener is in the process of selling the land to a third party. This has not been denied by the intervener. The plaintiff contended that in the event that the land is sold to the third party the plaintiff would suffer irreparable damage which could not be compensated by damages. In the interest of justice I hold that the *status quo* should therefore be preserved pending the outcome of the appeal even though as contended by the defendants that the plaintiff's interest is ultimately in the proceeds from the sale of the land.

In *Tan Soo Bing & Ors v. Tan Kooi Fook* [1997] 1 CLJ 556, the Federal Court held, *inter alia*, that although it was *ultra vires* the powers conferred upon the registrar under s. 417 of the Land Code to have entered the registrar's caveat, it was necessary in the interest of justice to maintain the *status quo* until final resolution of the dispute between the parties. Consequently, the court's order setting aside the High Court order directing the registrar to enter a registrar's caveat was stayed to allow the plaintiff time to file an appropriate claim against the interveners from disposing of the lots. In *Chong Wooi Leong v. Lebbey Sdn. Bhd.* [1998] 2 CLJ 509 the CA expressed a similar view where it said:

> ... if we were not to stay the respondent's vacant possession order before the hearing of the applicants' leave to appeal, it is clear the applicants' right to be there would be dissipated and gone before the appellants can have their several claims assessed and determined and their equity would largely have been eroded and destroyed. We were unanimous that to that extent the applicants' appeal would be nugatory.

It cannot be denied that by granting the stay order the intervener would be deprived the benefit of the land for the time being until the disposal of the appeal. The plaintiff on the other hand would suffer irreparable damage if the court does not grant the stay because the defendants would then be free to dispose of the land to the intervener. In the circumstances I am of the view that the balance of convenience is also in favour of maintaining the *status quo* until disposal of the appeal.

The next and final issue is the question of merit of the appeal. It is common ground that in order to succeed in this application the plaintiff must also show that there is merit in the appeal, or in other words the appeal is not "obviously unarguable". In this case the plaintiff is contending that he is acting on behalf of the majority of beneficiaries who are not satisfied with the conduct of the defendants in selling the land to the intervener. It is alleged that the defendants had acted against the interest of the beneficiaries in selling the land to the intervener for the sum of the RM16.2 million. The plaintiffs alleged that this is far below the prevailing market value of the land and the defendants also failed to give consideration to much higher offers from other parties. Further the valuation report tendered by the intervener exh. "KS7" to the affidavit of Krishnakumar (encl. 20) was prepared after the signing of the sale and purchase agreement between the defendants and the intervener. In failing to consider other offers the plaintiff alleged that the defendants failed to give proper consideration to the interest of the beneficiaries. For those reasons the plaintiff is now seeking to remove the existing trustees. Having considered the matter I am of the view that the plaintiff's argument is not without merit.

For the above reasons I allowed the plaintiff's application in encl. (50) herein. The costs of this application shall be costs in cause.